IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1802

AMERICAN MOTORS SALES CORPORATION,
Petitioner,

v.

DIVISION OF MOTOR VEHICLES OF THE COMMONWEALTH OF VIRGINIA,

and

VERN L. HILL, COMMISSIONER OF THE DIVISION OF MOTOR VEHICLES OF THE COMMONWEALTH OF VIRGINIA,

and

VIRGINIA AUTOMOBILE DEALERS ASSOCIATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN F. KAY, JR.
Mays, Valentine, Davenport & Moore
P. O. Box 1122
Richmond, Virginia 23208
Counsel for Petitioner

INDEX

CITATIONS

Cases

Constitutional Provisions

Statutes

IN THE

Supreme Court of the United States

October Term, 1978

No. .....

AMERICAN MOTORS SALES CORPORATION,
Petitioner,

v.

DIVISION OF MOTOR VEHICLES OF THE COMMONWEALTH OF VIRGINIA,

and

VERN L. HILL, COMMISSIONER OF THE DIVISION OF MOTOR VEHICLES OF THE COMMONWEALTH OF VIRGINIA,

and

VIRGINIA AUTOMOBILE DEALERS ASSOCIATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, American Motors Sales Corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on February 12, 1979, reversing the judgment of the United States District Court for the Eastern District of Virginia entered February 13, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 592 F.2d 219 (4th Cir. 1979). The opinion of the United States District Court for the Eastern District of Virginia is reported at 445 F. Supp. 902 (E.D. Va. 1978). The opinions are reprinted in the Appendix commencing on pages 21 and 2, respectively.[1]

JURISDICTION

The judgment of the Court of Appeals reversing the judgment of the District Court was entered on February 12, 1979. A timely petition for rehearing *en banc* was denied on March 7, 1979 and this petition for certiorari was filed within 90 days of that date. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether Va. Code § 46.1-547(d) violates the Commerce Clause of the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Article I, § 8.

"The Congress shall have power . . . [t]o regulate commerce . . . among the several states. . . ."

Statutes

Va. Code § 46.1-547(d)

> It is unlawful for any manufacturer, factory branch, distributor or distributor branch, or any field represen-

[1] References to the appendix are denoted "A. ....."

tative, officer, agent or any representative whatsoever of any of them:

* * *

(d) To grant an additional franchise for a particular line-make of motor vehicle in a trade area already served by a dealer or dealers in that line-make unless the franchisor has first advised in writing such other dealers in the line-make in the trade area; provided that no such additional franchise may be established in the trade area if the Commissioner has determined, if requested by any party within thirty days after receipt of the franchisor's notice of intention to establish the additional franchise, and after a hearing on the matter, that there is reasonable evidence that after the grant of the new franchise, the market will not support all of the dealerships in that line-make in the trade area; provided, further, that a reopening of a franchise in a trade area that has not been in operation for more than one year shall be deemed the establishment of a new franchise subject to the terms of this subsection[.]

1978 Supplement to volume 7 of the Code of Virginia, 1950, at pages 187-188.

STATEMENT OF THE CASE

Petitioner, American Motors Sales Corporation ("AMSC"), a Delaware corporation with its principal place of business in Southfield, Michigan, sells AMC and Jeep motor vehicles, parts, and accessories to franchised dealers in interstate commerce throughout the United States. In 1975, AMSC notified P. D. Waugh & Co. ("Waugh"), the only Jeep dealership in the Orange, Virginia market area, that it intended to grant a Jeep franchise to Early AMC, Inc. ("Early"), a franchised AMC and Suburu dealership in Orange, Virginia, at Early's established location

about two miles from Waugh's dealership. (A. 23-24.) The Jeep franchise offered to Early would have been an "additional franchise" within the meaning of Va. Code § 46.1-547(d).

Waugh then requested the Commissioner of Motor Vehicles of the State of Virginia ("the Commissioner") to conduct a hearing pursuant to Va. Code § 46.1-547(d) to determine whether the market could support both dealerships. The hearing officer found that Waugh's sales performance had been inadequate and that no reasonable evidence showed the trade area could not support two Jeep dealers. However, the Commissioner rejected the hearing officer's conclusion and prohibited AMSC from granting Early a Jeep franchise.[2] (A. 24.)

On November 5, 1976, AMSC and Early filed a complaint in the United States District Court for the Eastern District of Virginia against the Commissioner and the Division of Motor Vehicles of the State of Virginia ("DMV") asking the Court to permanently enjoin the Commissioner and the DMV from enforcing the provisions of Va. Code § 46.1-547(d) on the ground that the statute, on its face and as applied, violates the Constitution of the United States. Specifically, AMSC and Early contended that the statute violates (1) the Supremacy Clause, (2) the Due Process and

[2] On April 27, 1978 Waugh's franchise to sell Jeep vehicles was terminated, and on June 5, 1978, Early was awarded a franchise to sell Jeeps at its established location in Orange. This does not moot the case, however, since there plainly is an immediate prospect that AMSC will desire to establish franchises in areas in Virginia which are being served by existing franchisees who will object to the establishment of the additional franchises pursuant to Va. Code § 46.1-547(d). *Linmark Associates, Inc.* v. *Willingboro,* 431 U.S. 85, 86, n.1 (1977). Thus there remains a controversy "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co.* v. *Pacific Coal & Oil Co.,* 312 U.S. 270, 273 (1941). In fact, subsequent to the decision of the Court of Appeals, AMSC has been involved in such a controversy over the establishment of an additional Jeep franchise in the Roanoke, Virginia area.

Equal Protection Clauses of the Fourteenth Amendment, and (3) the Commerce Clause. (A. 24.) Jurisdiction was founded on the existence of a federal question and an amount in controversy greater than $10,000.00.

Following the admission of Waugh and the Virginia Association of Automobile Dealers as intervenor-defendants, the case was submitted to the District Court on cross-motions for summary judgment. On February 13, 1978, the District Court declared the statute an unconstitutional burden on interstate commerce and enjoined the Commissioner and the DMV from enforcing the statute. (A. 1.)

Noting that Jeep vehicles, like most other motor vehicles, are manufactured outside Virginia and "hence are articles of interstate commerce," the District Court stated: "That the challenged statute affects interstate commerce is beyond question." 445 F. Supp. at 905. (A. 5.) The District Court recognized that the test for determining the validity of state statutes affecting interstate commerce, as enunciated by this Court in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), and *A & P Tea Co.* v. *Cottrell*, 424 U.S. 366, 371-72 (1976), is:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

445 F.Supp. at 405. (A. 5.)

Applying this test to Va. Code § 46.1-547(d), the District Court concluded (1) that under the authority of *Buck* v.

Kuykendall, 267 U.S. 307 (1925), and *H. P. Hood & Sons, Inc.* v. *Du Mond,* 336 U.S. 525 (1949), the preservation of competition is not a legitimate local purpose under the Commerce Clause, and (2) that while the protection of dealers against unfair trade practices by manufacturers is a legitimate local purpose, the statute is unconstitutional under the rule of *A & P Tea Co.* v. *Cottrell, supra,* because the State's purpose "could be promoted as well with a lesser impact on interstate activities." 445 F.Supp. at 911. (A. 19.)

Because the resolution of plaintiff's remaining constitutional challenges to the statute were unnecessary to appropriate adjudication of the case, the District Court refrained from deciding any constitutional issues other than those raised under the Commerce Clause.

On appeal, the United States Court of Appeals for the Fourth Circuit reversed the judgment of the District Court and dissolved the injunction against enforcement of Va. Code § 46.1-547(d). In support of its decision, the Court of Appeals relied primarily upon *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117 (1978), and *New Motor Vehicle Board* v. *Orrin W. Fox Co.,* ..... U.S. ....., 99 S. Ct. 403, 58 L. Ed. 2d 361 (1978), both of which were decided after this case was decided by the District Court.[3]

The Court of Appeals, after acknowledging the test enunciated in *Pike* v. *Bruce Church* and *A & P Tea Co.* v. *Cottrell* for determining the validity of a statute challenged under the Commerce Clause, held (1) that the Virginia statute serves a legitimate local purpose, (2) that it treats

---

[3] The judgment of the District Court in the present case was entered on February 13, 1978. This Court decided *Exxon Corp* v. *Governor of Maryland* on June 14, 1978, after the briefs of the parties in the appeal of this case had been filed but before oral argument on July 18, 1978. *New Motor Vehicle* v. *Orrin W. Fox Co.* was decided by this Court on December 5, 1978.

interstate and intrastate commerce evenhandedly, and (3) that it imposes no unconstitutional burden on interstate commerce.

Because the District Court did not address the other constitutional challenges to the statute which were not briefed on appeal, the Court of Appeals, noting that AMSC and Early had reserved those challenges, remanded the case to the District Court for the consideration of those issues. By orders entered March 13, April 6, and May 29, 1979, the Court of Appeals stayed until June 5, 1979 the issuance of that part of its mandate remanding the case to the District Court for the consideration of the additional challenges, which have no effect on the issue here presented for review.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Presents A Constitutional Question Of Great Importance Which Has Not Been, But Should Be, Settled By This Court.

As this Court noted in *New Motor Vehicle Board* v. *Orrin W. Fox Co., supra,* 58 L. Ed. 2d at 370, twenty-five states have enacted legislation to protect retail car dealers from perceived abusive and oppressive acts by manufacturers, and at least seventeen other states have enacted statutes which, like Va. Code § 46.1-547(d), prescribe conditions under which new or additional dealerships may be permitted in the territory of an existing dealership. 58 L. Ed. 2d at 371, n.7. Despite the enormous economic impact of these statutes on manufacturers of motor vehicles and on motor vehicle dealers, and the impact on the consuming public, this Court has never addressed the issue whether a statute such as

Va. Code § 46.1-547(d) imposes an unconstitutional burden on interstate commerce in violation of the Commerce Clause.

In *Fox,* this Court decided that a California statute, in some ways similar to Va. Code § 46.1-547(d), did not violate procedural due process mandated by the Fourteenth Amendment and did not conflict with the Sherman Act. The decision in *Fox* was narrowly limited to those two issues. It contained no reference to or discussion of the Commerce Clause though that issue was brought to the attention of this Court by a footnote to the appellee's brief. Therefore, the question whether state statutes, similar to Va. Code § 46.1-547(d), which prescribe conditions under which new or additional automobile dealerships may be permitted in the territory of an existing dealership, unconstitutionally burden interstate commerce was not decided by this Court in *Fox* and has not been decided by this Court in any other case.

Moreover, as noted by the Court of Appeals in its opinion, some state courts have held that similar statutes violate the Commerce Clause and some state courts have held that such statutes do not violate the Commerce Clause. 592 F.2d at 221, n.2. (A.22.) Thus, there are conflicting decisions by the state courts on this important question involving the Constitution of the United States. *See, e.g., Gen. GMC Trucks, Inc.* v. *Gen. Motors Corp., Etc.,* 239 Ga. 373, 237 S.E.2d 194, 196-198, *cert. denied,* 434 U.S. 996 (1977); *cf. Tober Foreign Motors* v. *Reiter Oldsmobile,* ..... Mass. ....., 381 N.E.2d 908 (1978).

Accordingly, AMSC submits that its petition for certiorari should be granted because the decision below presents an important and complex question of constitutional law which has not been, but should be, settled by this Court.

II.

The Decision Below Is In Conflict With The Principles Established By H. P. Hood & Sons, Inc. v. Du Mond and Buck v. Kuykendall.

The Court of Appeals held that Va. Code § 46.1-547(d) is distinguishable from the statutes invalidated by this Court in *H. P. Hood & Sons, Inc.* v. *Du Mond, supra,* and *Buck* v. *Kuykendall, supra.* 592 F.2d at 223. (A. 27.) If it is not, as AMSC contends, then the decision below is directly in conflict with the principles of *Hood* and *Buck* which this Court has long applied in cases involving Commerce Clause issues.

In *Buck,* this Court struck down a Washington statute requiring each common carrier using the state's highways to obtain a certificate from the Director of Public Works declaring that "public convenience and necessity" justified the operation of the carrier. Buck, a citizen of Washington, was denied a certificate on the ground that the market was already adequately served.[4] This Court noted that the primary purpose of the statute was the prohibition of competition and that:

> It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and the same manner. . . . Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate com-

[4] Contrary to the inference to be drawn from the decision of the Court of Appeals, 592 F.2d at 221 (A. 27.), the Washington statute in *Buck was* applied evenhandedly to carriers engaged in both interstate and intrastate commerce. In *Northern P.R. Co.* v. *Schoenfeldt,* 123 Wash. 579, 213 P. 26 (1923), a case involving the statute in issue in *Buck,* the Supreme Court of Washington stated that the statute applied to carriers engaged in interstate or intrastate commerce, and that "it applie[d] alike to each class without discrimination." 213 P. at 28.

> merce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the Commerce Clause.

267 U.S. at 315-316.

Relying upon *Buck*, the District Court in the present case held, *inter alia*:

1. The statute determines not the manner in which automobiles may be sold but rather who may sell them.
2. The statute prohibits Early from selling Jeep vehicles while permitting Waugh to sell them "for the same purpose and in the same manner."
3. The statute is a regulation not merely of Virginia's markets but of interstate commerce itself.
4. The effect of the statute on interstate commerce is "not merely to burden but to obstruct it" because American is totally prohibited from selling Jeep vehicles through Early's present franchise.

See 445 F.Supp. at 906. (A. 7-8.)

In *H. P. Hood & Sons, Inc.* v. *Du Mond, supra,* this Court reaffirmed the principle of *Buck* v. *Kuykendall. Hood* involved a statutory scheme[5] which the District Court de-

[5] Section 258-C of Article 21 of the Agriculture and Market Law of New York, Laws of 1934, C. 126 provided in part:

> No license shall be granted to a person not now engaged in business as a milk dealer except for the continuation of a new existing business, and no license shall be granted to authorize the extension of an existing business by the operation of an additional plant or other new or additional facility, unless the Commissioner is satisfied that the applicant is qualified by character, experience, financial responsibility to properly conduct the proposed business, that the issuance of the license will not tend to a destructive competition in a market already adequately served, and that the issuance of the license is in the public interest. 336 U.S. at 527-28, n.3.

scribed in the present case as "almost identical in effect" to the legislation challenged herein. In that case, a Massachusetts milk distributor, which had two milk receiving depots in eastern New York for the purchase of locally produced milk for shipment to Massachusetts, was denied a license for a third depot in the same area by the New York State Commissioner of Agriculture and Markets on the grounds that there was no evidence that milk producers in the locality did not have an adequate market or would receive higher prices by delivering milk to the proposed receiving station and that the grant of an additional license "would tend to a destructive competition in a market already adequately served. . . ." 336 U.S. at 529.

This Court affirmed the principle set out in *Buck* and struck down the New York statute, which applied even-handedly to all milk dealers, stating:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to *every market* in the Nation. . . .

Id. at 539. [Emphasis added by District Court, 445 F. Supp. at 906. (A. 8-9.)]

Thus, the District Court, applying *Hood,* held:

> The instant case is to be governed by this doctrine. Plaintiffs must be accorded free access to every market in the Nation, including Orange, Virginia.

445 F.Supp. at 906. (A. 9.)

As recognized by the District Court, the Virginia statute obstructs the flow of interstate commerce. *Id.* (A. 8.) The District Court, after examining "the nature of the local

interest involved" to determine "the extent of the burden on interstate commerce that will be tolerated" and "whether the local interest could be promoted as well with a lesser impact on interstate commerce," as mandated by *Pike* v. *Bruce Church* and *A & P Tea Co.* v. *Cottrell,* found that the purpose of protecting dealers against unfair trade practices on the part of automobile manufacturers could be accomplished with a much lesser burden on interstate commerce.[6]

AMSC submits that the District Court properly applied the principles enunciated by this Court in *Buck, Hood, Pike* and *A & P* to the Commerce Clause question here in issue and that, because of the importance of that question to automobile manufacturers, automobile dealers and the public, the petition for certiorari should be granted.

III.

The Court Of Appeals Misapprehended The Effect Of Exxon Corp. v. Governor of Maryland On The Issue Involved In This Case.

In reversing the judgment of the District Court, the Court of Appeals relied heavily upon the decision of this Court in *Exxon Corp.* v. *Governor of Maryland, supra,* decided June 14, 1978. The Court stated:

> Tested by the principles explained in *Exxon,* we conclude that the Virginia statute imposes no unconstitutional burden on interstate commerce.

592 F.2d at 223. (A. 28.)

---

[6] The Court of Appeals overlooked the far reaching effects of Va. Code § 46.1-547(d) on interstate commerce and incorrectly held that the only effect of the statute was "the restriction of intrabrand competition." 592 F.2d at 223-224. (A. 28-29.) Moreover, the Court of Appeals failed to apply the balancing test required by *Pike* v. *Bruce Church* and *A & P Tea Co.* v. *Cottrell.*

The Maryland statute upheld in *Exxon,* however, is so different in purpose, operation, and effect from Va. Code § 46.1-547(d) that the principles enunciated in *Exxon* should not be controlling.

The Maryland statute prohibits a producer or refiner of petroleum products from operating any retail service station in Maryland and requires that such stations be operated by independent retail dealers. The statute does not limit the number of retail sellers of petroleum products; it simply prohibits a particular method for the local retail sale of such products. This Court emphasized this characteristic of the statute's operation in rejecting the Commerce Clause challenge in *Exxon:*

> We cannot, however, accept appellants' underlying notion that the Commerce Clause protects the particular structure or *methods of operation in a retail market.* [Emphasis supplied.]

437 U.S. at 127.

The statute in this case does not simply regulate the structure or methods of operation in retail markets; rather, the statute here involved prohibits a *purely interstate transaction* between a manufacturer of motor vehicles and a local automobile dealer. The effect of the Virginia statute on interstate commerce is far greater than the effect of the Maryland statute.

The Maryland statute is similar to Va. Code § 46.1-547.2 which is not involved in this case and which provides in part:

> It is unlawful for any motor vehicle manufacturer, factory branch, distributor, distributor branch or subsidiary thereof, to own, operate or control any motor vehicle dealership in this State. . . .

Exxon might well be controlling if the constitutionality of that statute were in issue or if the statute in *Exxon* had

prohibited producers and refiners from entering into new service station dealership agreements in areas already served by existing retail dealers under circumstances similar to those described in Va. Code § 46.1-547(d).

However, *Exxon* should not be controlling with respect to the constitutionality of Va. Code § 46.1-547(d) which prohibits manufacturers and others, under stated circumstances, from franchising an independent retail automobile dealer. Under the Maryland statute, the producers and refiners of petroleum products are not prohibited from shipping their products into Maryland to as many independent retail stations as are willing to buy them. Moreover, producers and refiners who had owned and operated service stations can change their method of operation by turning them over to independent dealers and thus continue to have their products sold through the same stations to the same customers. By so doing, the burden of the statute on interstate commerce can be alleviated.

However, under Va. Code § 46.1-547(d), manufacturers of motor vehicles who wish to have their products marketed in Virginia through new retail dealers and who are prohibited by the statute from so doing cannot change their method of operation to alleviate the burden on interstate commerce. These manufacturers are limited to the number of retail dealers that the state will permit through which to sell their products. In fact, if a manufacturer is prohibited by Va. Code § 46.1-547.2 from operating a retail dealership and, at the same time, is prohibited by Va. Code § 46.1-547(d) from franchising new independent retail dealerships, the burden of the latter statute on interstate commerce becomes even more onerous.

In short, Va. Code § 46.1-547(d) obstructs the flow of interstate commerce. In this case, it totally prohibits the

flow of Jeep vehicles, parts and accessories from AMSC to Early. On the other hand, the Maryland statute involved in *Exxon* merely regulates the structure or methods by which local retail sales of petroleum can be made.[7]

The scope of *Exxon* should be clarified by this Court because if the test applied by the Court of Appeals, relying on *Exxon,* is a proper one, it is difficult to conceive of any burden on interstate commerce that would be held to violate the Commerce Clause, absent discrimination between interstate and intrastate commerce. The District Court recognized the far reaching effects of statutes such as Va. Code § 46.1-547(d) on the shape of American commerce. It stated:

> Policy considerations strongly support the Court's conclusion. The shape of American commerce has been transformed by the proliferation of all types of chain and franchise business operations. Motels, drug stores, fast food restaurants, ice cream shops, variety and department stores, tire dealers and numerous other businesses frequently operate under the franchise system. If Virginia were permitted to utilize § 46.1-547(d) to keep additional motor vehicle franchises out of areas of high unemployment and slow population growth, it could enact similar statutes to bar all types of additional franchises from what it views to be economically weak markets. Under such circumstances, the State, rather than the marketplace, would become the arbiter of the appropriate level of competition in each franchised industry. And if Virginia could constitutionally do this,

[7] The holding in *Exxon* is consistent with the holdings of this Court in *Breard* v. *Alexandria,* 341 U.S. 622 (1951), and *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission,* 341 U.S. 329 (1951), cited by the Court of Appeals at 592 F.2d at 223. (A. 27.) Each deals with a regulation of methods of local sales to local retail customers. This case, however, deals with a statute the effect of which is to prohibit an interstate transaction between a manufacturer and a retail dealer.

> so could every other state. The end result would be the kind of restrictive and segmented economy which the Commerce Clause was specifically intended to prohibit. *See H. P. Hood & Sons* v. *Du Mond, supra* at 538-39.

445 F.Supp. at 911. (A. 19.)

AMSC submits that the Court of Appeals misapprehended the effect of this Court's decision in *Exxon* on the important constitutional question involved in the present case. For this reason also, the petition for certiorari should be granted.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

JOHN F. KAY, JR.
Mays, Valentine, Davenport & Moore
Post Office Box 1122
Richmond, Virginia 23208
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 1979, three copies of the Petition for Writ of Certiorari were mailed, first class postage prepaid, to the Honorable J. Marshall Coleman, Attorney General of the Commonwealth of Virginia, Supreme Court Building, 1101 East Broad Street, Richmond, Virginia 23219, counsel for respondents Division of Motor Vehicles of the Commonwealth of Virginia and Vern L. Hill, Commissioner of the Division of Motor Vehicles of the Commonwealth of Virginia, and to David F. Peters, Esquire, and Dale A. Oesterle, Esquire, Hunton & Williams, P. O. Box 1535, Richmond, Virginia 23212, counsel for respondent Virginia Automobile Dealers Association. I further certify that all parties required to be served have been served.

JOHN F. KAY, JR.
Mays, Valentine, Davenport & Moore
Post Office Box 1122
Richmond, Virginia 23208
Counsel for Petitioner